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CHAPTER II

NATIONALITY IN RELATION TO SUCCESSION OF STATES

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GE.97-62446 (E)

Article 13 69/

Status of habitual residents

1. The status of persons concerned as habitual residents shall not be affected by the succession of States.

2. A State concerned shall take all necessary measures to allow persons concerned who, because of events connected with the succession of States, were forced to leave their habitual residence on its territory to return thereto.

Commentary

(1) Paragraph 1 of article 13 sets out the rule that the status of habitual residents is not affected by a succession of States as such, or in other words, that persons concerned who are habitual residents of a territory on the date of the succession retain such status. Habitual residence is indeed a very important criterion for the determination of nationality in cases of succession of States, as indicated in the commentaries to the draft articles in Part II below.

(2) Paragraph 2 addresses the problem of habitual residents in the specific case where the succession of States is the result of events leading to the displacement of a large part of the population. The purpose of this provision is to ensure the effective restoration of the status of habitual residents as protected under paragraph 1. The Commission felt that, in light of recent experience, it was desirable to address explicitly the problem of this vulnerable group of persons. Certain members expressed reservations with respect to this provision. Some of those holding this view argued that this provision was superfluous in the light of paragraph 1, others that paragraph 2 dealt with the problem of refugees and was therefore outside the scope of the draft articles.

(3) The question of the status of habitual residents addressed in article 13 is different from the question whether such persons may or may not retain the right of habitual residence in a State concerned if they acquire, following the succession of States, the nationality of another State concerned. While there was general agreement in the Commission on the principle that a State concerned has the obligation to preserve the right of

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69/ Article 13 corresponds to article 10 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, pp. 80-81.

habitual residence of persons concerned who, following a succession of States became ex lege nationals of another State concerned, views differed considerably on the question as to whether the same should apply in respect of habitual residents who became voluntarily nationals of another State concerned. Some members believed that international law, at present, allowed a State to require that the latter category of persons transfer their habitual residence outside of its territory. 70/ They stressed, however, that it was important to ensure that persons concerned be provided with a reasonable time limit for such transfer of residence, as proposed by the Special Rapporteur in his Third report. 71/

(4) Other members, however, felt that the requirement of transfer of residence did not take into consideration the current stage of the development of human rights law. They considered that the draft articles should prohibit the imposition by States of such a requirement, even if this entailed moving into the realm of lex ferenda. 72/

70/ It must be noted that, under the treaties concluded with a number of successor States after the First World War, an option for the nationality of a State other than the State of habitual residence carried the obligation to transfer one's residence accordingly. Such provisions were contained in respective article 3 of the Treaty of Versailles with Poland, the Treaty of Saint-Germain-en-Laye with Czechoslovakia, the Treaty of Saint-Germain-en-Laye with the Serb-Croat-Slovene State and the Treaty of Paris with Romania (G.F. de Martens, Nouveau recueil général de traités, third series, vol. XIII, pp. 505, 514, 524 and 531 respectively). In the case of the Acquisition of Polish nationality, Arbitrator Kaeckenbeeck held that the successor State normally had the right "established in international practice, and expressly recognized by the best authors" to require the emigration of such persons as had opted against the nationality of the successor State; accordingly Poland was entitled to order those inhabitants of Upper Silesia who had opted for German nationality to leave at the end of a specific period. (United Nations, Reports of International Arbitral Awards, vol. I, p. 427.) Similarly, it has been stated more recently that, "failing a stipulation expressly forbidding it, the acquiring State may expel those inhabitants who have made use of the option and retained their old citizenship, since otherwise the whole population of the ceded territory might actually consist of aliens". (Oppenheim's International Law, op. cit., p. 685.)

71/ See Draft article 10, paragraph 3, document A/CN.4/480.

72/ In this connection, it must be observed that, in recent cases of succession of States in Eastern and Central Europe, although the legislations of some successor States provided that their nationals who voluntarily acquired the nationality of another successor State would automatically lose their nationality, such legislations did not require persons concerned to transfer their residence. The European Convention on Nationality stipulates in this respect that "nationals of a predecessor State habitually resident in the territory over which sovereignty is transferred to a successor State and who have not acquired its nationality shall have the right to remain in that State" (Article 20, para. 1 (a), Council of Europe document DIR/JUR (97) 6).

(5) The Commission, without taking a position on the above discussion, concluded that this was an issue relating to the treatment of aliens and it consequently saw no particular need to address the matter in the present draft articles.

Article 14 73/

Non-discrimination

States concerned shall not deny persons concerned the right to retain or acquire a nationality or the right of option upon the succession of States by discriminating on any ground.

Commentary

(1) The interest in avoiding discriminatory treatment as regards matters of nationality in relation to a succession of States led to the inclusion of certain relevant provisions in several treaties adopted following the First World War, as attested by the advisory opinion of the Permanent Court of International Justice on the question of Acquisition of Polish Nationality, in which the Court stated that "[o]ne of the first problems which presented itself in connection with the protection of minorities was that of preventing [... new States, ... which, as a result of the war, have had their territory considerably enlarged, and whose population was not therefore clearly defined from the standpoint of political allegiance] from refusing their nationality, on racial, religious or linguistic grounds, to certain categories of persons, in spite of the link which effectively attached them to the territory allocated to one or other of these States". 74/

(2) The problem of discrimination in matters of nationality was also addressed in article 9 of the 1961 Convention on Reduction of Statelessness, which prohibits the deprivation of nationality on racial, ethnic, religious or political grounds, albeit in a more general context. The European Convention on Nationality also contains a general prohibition of discrimination in

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Similarly, article 16 of the Venice Declaration provides that "[t]he exercise of the right to choose the nationality of the predecessor State, or of one of the successor States, shall have no prejudicial consequences for those making that choice, in particular with regard to their right to residence in the successor State and their movable or immovable property located therein". (Council of Europe document CDL-NAT (96) 7 rev.)

73/ Article 14 corresponds to ariticle 12 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 88.

74/ P.C.I.J. 1923, Series B, No. 7, p. 15.

matters of nationality: article 5, paragraph 1, provides that "[t]he rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin". 75/

(3) While discrimination has been mostly based on the above-mentioned criteria, there may still be other grounds for discrimination in nationality matters in relation to a succession of States. 76/ The Commission therefore decided not to include in article 14 an illustrative list of such criteria and opted for a general formula prohibiting discrimination on "any ground", avoiding, at the same time, the risk of any a contrario interpretation.

(4) Article 14 prohibits discrimination resulting in the denial of the right of a person concerned to a particular nationality or, as the case may be, to an option. It does not address the question whether a State concerned may use any of the above or similar criteria for enlarging the circle of individuals entitled to acquire its nationality. Reference may be made in this connection to the jurisprudence of the Inter-American Court of Human Rights which, in the case concerning Amendments to the naturalization provisions of the Constitution of Costa Rica, 77/ concluded that it was basically within the sovereignty of a State to give preferential treatment to aliens who, viewed objectively, would more easily and more rapidly assimilate within the national community and identify more readily with the traditional beliefs, values and institutions of that country, and accordingly held that

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75/ Article 18 of the Convention explicitly states that this provision is applicable also in situations of State succession. Council of Europe document DIR/JUR (97) 6.

76/ See, e.g., recent discussions concerning the application of the requirement of a clean criminal record for attributing nationality upon option. Experts of the Council of Europe stated in this connection that, "[while a] clean criminal record requirement in the context of naturalization is a usual and normal condition and compatible with European standards in this area, ... the problem is different in the context of State succession [where] it is doubtful whether ... under international law citizens that have lived for decades on the territory, perhaps [were] even born there, can be excluded from citizenship just because they have a criminal record ..." (Report of the Experts of the Council of Europe on the Citizenship Laws, op. cit., paras. 73 and 76). A similar view has been expressed by UNHCR experts, according to whom "[t]he placement of this condition upon granting of citizenship in the context of State succession is not justified [and] would appear discriminatory vis-à-vis a sector of the population which has a genuine and effective link with the [successor State]". (The Czech and Slovak Citizenship Laws and the Problem of Statelessness, op. cit., para. 76.)

77/ Advisory opinion of 19 January 1984, ILR, vol. 79, p. 283.

preferential treatment in the acquisition of Costa Rican nationality through naturalization, which favoured Central Americans, Ibero-Americans and Spaniards over other aliens, did not constitute discrimination contrary to the Inter-American Convention on Human Rights. 78/ The principle applied by the Court appears to be also valid in the more specific context of a succession of States.

(5) Some members regretted the fact that article 14 did not address the question of the discriminatory treatment by a successor State of its nationals depending on whether they had its nationality prior to the succession of States or they acquired it as a result of such succession. Others believed that this was a human rights issue of a more general character and therefore outside the scope of the present draft articles.

Article 15 79/

Prohibition of arbitrary decisions concerning nationality issues

In the application of the provisions of any law or treaty, persons concerned shall not be arbitrarily deprived of the nationality of the predecessor State, or arbitrarily denied the right to acquire the nationality of the successor State or any right of option, to which they are entitled in relation to the succession of States.

Commentary

(1) Article 15 applies to the specific situation of a succession of States the principle embodied in article 15, paragraph 2, of the Universal Declaration of Human Rights, which provides that "[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." The prohibition of arbitrary deprivation of nationality has been reaffirmed in a number of other instruments, such as the 1961 Convention on the Reduction of Statelessness, 80/ the 1989 Convention on the Rights of the Child, 81/ and the 1997 European Convention on Nationality. 82/

78/ See also Chan, op. cit., p. 6.

79/ Article 15 corresponds to article 13 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 92.

80/ Article 8, paragraph 4.

81/ Article 8.

82/ Articles 4, paragraph (c) and 18.

(2) Article 15 contains two elements. The first is the prohibition of the arbitrary withdrawal by the predecessor State of its nationality from persons concerned who were entitled to retain such nationality following the succession of States and of the arbitrary refusal by the successor State to attribute its nationality to persons concerned who were entitled to acquire such nationality either ex lege or upon option. The second element is the prohibition of the arbitrary denial of a person's right of option that is an expression of the right of a person to change his or her nationality in the context of a succession of States.

(3) The opening phrase "In the application of the provisions of any law or treaty" indicates that the purpose of the article is to prevent abuses which may occur in the process of the application of legal instruments which, in themselves, are consistent with the present draft articles. The expression "the provisions of any law or treaty" has to be interpreted as referring to legislative provisions in the broad sense of the term or treaty provisions which are relevant to the attribution or withdrawal of nationality or to the recognition of the right of option to a particular person concerned. The phrase "to which they are entitled" refers to the subjective right of any such person based on above-described provisions.

Article 16 83/

Procedures relating to nationality issues

> Applications relating to the acquisition, retention or renunciation of nationality or to the exercise of the right of option in relation to the succession of States shall be processed without undue delay and relevant decisions shall be issued in writing and shall be open to effective administrative or judicial review.

Commentary

(1) Article 16 is intended to ensure that the procedure followed with regard to nationality matters in cases of succession of States is orderly,

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83/ Article 16 corresponds to article 14 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 94.

given its possible large-scale impact. 84/ The elements spelled out in this provision represent minimum requirements in this respect.

(2) The review process regarding decisions concerning nationality in relation to the succession of States has been based in practice on the provisions of municipal law governing review of administrative decisions in general. In some cases this encompassed judicial review; in others it did not. 85/ The existence of a judicial review process did not exclude prior recourse to an administrative review process. The phrase "administrative or judicial review" used in this article is not intended to suggest two mutually exclusive processes. 86/

Article 17 87/

Exchange of information, consultation and negotiation

1. States concerned shall exchange information and consult in order to identify any detrimental effects on persons concerned with respect to their nationality and other connected issues regarding their status as a result of the succession of States.

84/ It is interesting to note that, in relation to recent cases of succession of States, the UNHCR Executive Committee stressed the importance of fair and swift procedures relating to nationality issues when emphasizing that "the inability to establish one's nationality ... may result in displacement". (Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the work of its forty-sixth session, Official Records of the General Assembly, Fiftieth Session, Supplement No. 12A (A/50/12/Add.1), para. 20.)

85/ See "Nationalité, minorités et succession d'États dans les pays d'Europe centrale et orientale", CEDIN, Paris X-Nanterre, Table ronde, décembre 1993, responses to the Questionnaire.

86/ In the same vein, article 12 of the European Convention on Nationality sets out the requirement that decisions concerning nationality "be open to an administrative or judicial review." The Convention further contains the following requirements regarding procedures relating to nationality: a reasonable time limit for processing applications relating to nationality issues; the provision of reasons for decisions on these matters in writing; and reasonable fees (articles 10, 11 and 13 respectively). Council of Europe document DIR/JUR 97 (6).

87/ Article 17 corresponds to article 15 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 95.

2. States concerned shall, when necessary, seek a solution to eliminate or mitigate such detrimental effects by negotiation and, as appropriate, through agreement.

Commentary

(1) The Commission considered that exchange of information and consultations between States concerned are essential components of any meaningful examination of the effects of a succession of States on persons concerned. The purpose of such endeavours is to identify the negative repercussions a particular succession of States may have both on the nationality of the persons concerned and on other issues intrinsically linked to nationality.

(2) Paragraph 1 sets out the obligations of States concerned in this respect in the most general terms, without indicating the precise scope of the questions which are to be the subject of consultations between them. One of the most important questions is the prevention of statelessness. States concerned, shall, however, also address questions such as dual nationality, the separation of families, military obligations, pensions and other social security benefits, the right of residence, etc.

(3) Concerning paragraph 2, there are two points worth noting. First, the obligation to negotiate to seek a solution does not exist in the abstract; States do not have to negotiate if they have not identified any adverse effects on persons concerned as regards the above questions. Second, it is not presumed that every negotiation must inevitably lead to the conclusion of an agreement. The purpose, for example, could simply be achieved through the harmonization of national legislations or administrative decisions. States

concerned may, however, prefer to conclude an agreement to resolve the problems they have identified. 88/ The obligation in paragraph 2 must be understood in the light of these two caveats.

(4) In the view of the Commission, there is a close link between the obligations in article 17 and the right to a nationality in the context of a succession of States embodied in article 1, as the purpose of the former is to ensure that the right to a nationality is an effective right. Article 17 is also based on the general principle of the law of State succession providing for the settlement of certain questions relating to succession by agreement between States concerned, embodied in the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

(5) Article 17 does not address the problem which arises when one of the States concerned does not act in conformity with its provisions or when negotiations between States concerned are abortive. Even in such situations, however, there are certain obligations incumbent upon States concerned and the refusal of one party to consult and negotiate does not entail complete freedom of action for the other party. These obligations are included in Part I of the present draft articles.

88/ The Czech Republic and Slovakia, for example, concluded several agreements of this nature, such as the Treaty on interim entitlement of natural and legal persons to profit-related activities on the territory of the other Republic, the Treaty on mutual employment of nationals, the Treaty on the transfer of rights and obligations from labour contracts of persons employed in organs and institutions of the Czech and Slovak Federal Republic, the Treaty on the transfer of rights and obligations of policemen serving in the Federal Police and members of armed forces of the Ministry of the Interior, the Treaty on social security and the administrative arrangement to that Treaty, the Treaty on public health services, the Treaty on personal documents, travel documents, drivers' licences and car registrations, the Treaty on the recognition of documents attesting education and academic titles, the Agreement on the protection of investment and a number of other agreements concerning financial issues, questions of taxation, mutual legal assistance, cooperation in administrative matters, etc.